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No. 88-1458

In the Supreme Court of the United States

OCTOBER TERM, 1988

J. ALFRED RIDER, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
MICHAEL JAY SINGER
GREGORY C. SISK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States Postal Service may be held liable on estoppel grounds because a Postal Service employee made an unauthorized oral promise that third-class mail would be delivered within a specified time, notwithstanding a regulation providing that the time of delivery of third-class mail is not guaranteed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 862 F.2d 239. The district court's order and judgment are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1988. The petition for a writ of certiorari was filed on March 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner contends that he requested expeditious delivery of election materials by third-class bulk rate mail, that he was given an oral promise by an unnamed Postal Service employee that the materials would be delivered within 48 hours, that he paid $34,200 postage in reliance

on the employee's promise, and that some of the materials were not delivered within 48 hours. Pet. App. A3. The applicable Postal Service regulation provides that the delivery of third-class mail within a specified time is not guaranteed. Domestic Mail Manual (DMM) § 630 (1987); Pet. App. A3.

2. Petitioner filed contractual and quasi-contractual claims in district court. In a summary order without opinion, the district court dismissed the complaint for failure to state a claim. The United States Court of Appeals for the Ninth Circuit affirmed on the basis that "under the facts as alleged in the complaint the Postal Service cannot be estopped from denying the authority of the employee to make the representations." Pet. App. A3. Relying upon the established principle that the federal government may not be estopped on the same terms as other litigants (*ibid.*), the court held there was no allegation in this case of the type of affirmative misconduct that might permit an estoppel of the Postal Service (Pet. App. A4-A6).

The court rejected petitioner's argument that estoppel should lie against the Postal Service because it was engaged in a proprietary enterprise, explaining that the Ninth Circuit has rejected the distinction between sovereign and proprietary functions in deciding whether estoppel applies against the government. Pet. App. A7. The court also held that the "sue-and-be-sued" clause of 39 U.S.C. 401(1), while waiving the sovereign immunity of the Postal Service, did not remove the "separate" protection of "the substantive doctrine of estoppel against the government." Pet. App. A7.

ARGUMENT

1. The court of appeals correctly refused to estop the Postal Service on the grounds that an unnamed postal

employee had made promises or guarantees concerning the time for delivery of third-class mail. According to regulation, expeditious delivery of third-class mail is not guaranteed.[1] Estoppel of the government cannot be premised on the actions of subordinate employees not delegated the authority to waive express regulatory provisions. *Federal Crop. Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

Indeed, this Court has questioned whether "estoppel can ever be appropriately applied against the Government" (*Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 66 (1984)) and has never identified any case in which such an estoppel could properly lie.[2] Although the Court

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[1] DMM § 630 explicitly provides:

> Third-class mail may receive deferred service. The Postal Service does not guarantee the delivery of third-class mail within a specified time.

The DMM is issued periodically and is incorporated by reference into the Code of Federal Regulations. See 39 C.F.R. 111.1. Mailers and other postal customers are thus presumed to have notice of its contents. See 44 U.S.C. 1507.

Bulk rate third-class mail is typically the "medium of choice" for the economical distribution of circulars and other printed matter, not for the expeditious transmission of important business or personal correspondence. *Rider* v. *United States*, 7 Cl. Ct. 770, 773 (1985). More expeditious handling is given to Express Mail, first-class mail, and second-class publications. Express Mail is the *only* class of mail with a guaranteed time of delivery. *Rider*, 7 Cl. Ct. at 773.

[2] See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp* v. *Merrill*, 332 U.S.

has reserved the question whether, in some circumstances, the government may be estopped by the "affirmative misconduct" of government employees (*Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam)), the mistaken oral representation by the employee here cannot be regarded as conduct even approaching the serious "affirmative misconduct" that may warrant an estoppel. See Pet. App. A4-A6.

Petitioner asserts, without any explanation or argument, that the court of appeals' decision conflicts with the holding of the Seventh Circuit in *Azar* v. *United States Postal Service*, 777 F.2d 1265 (1985). In both *Azar* and its earlier decision in *Portmann* v. *United States*, 674 F.2d 1155 (1982), the Seventh Circuit held that the government could be estopped "in the unique situation in which a party seeks to estop the Postal Service from relying on Express Mail insurance limits." *Azar*, 777 F.2d at 1271; see also *Portmann*, 674 F.2d at 1168-1169. The court emphasized "[t]he narrow reach of [its] holding" and focused upon the fact that the Express Mail service was in direct competition with private courier services. *Azar*, 777 F.2d at 1271; see also *Portmann*, 674 F.2d at 1169. The Seventh Circuit has subsequently affirmed that these decisions are limited to the specific context of the Postal Service's Express Mail service. *Crown* v. *United States Railroad Retirement Bd.*, 811 F.2d 1017, 1021 (1987).

Unlike Express Mail, the bulk rate third-class mail service at issue in this case is not a primarily commercial activity in direct competition with private delivery services. Indeed, addressed, third-class circulars are defined as "let-

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380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, 459 U.S. 14 (1982); *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51 (1984).

ters" in postal regulations and may not legally be carried outside the mail without the payment of postage. 39 U.S.C. 601-606; 18 U.S.C. 1693-1697; 39 C.F.R. 310-320; see also *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981) (referring to the longstanding "postal monopoly" created by these statutes).

In short, even had this case been decided under the Seventh Circuit's precedents, the Postal Service's activities here would not have been excepted from the general rule precluding estoppel of the government.[3]

2. In any event, "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services, Inc.*, 467 U.S. at 61. Although the court of appeals rested its decision on the conclusion that "affirmative misconduct" had not been shown, petitioner's claim could not pass muster even if made against a private defendant.

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[3] The Seventh Circuit, unlike the Ninth Circuit, has not firmly rejected any distinction between the government's "proprietary" and "sovereign" functions when considering estoppel claims against the government. Compare *Azar* v. *United States Postal Service*, 777 F.2d 1265, 1271 (7th Cir. 1985) (acknowledging distinction) and *Portmann* v. *United States*, 674 F.2d 1155, 1160-1162 (7th Cir. 1982) (identifying "proprietary" or commercial character of government activity as one factor to be considered when weighing estoppel claim against the government, though declining to give it dispositive weight) with Pet. App. A7 and *Wagner* v. *Director, Federal Emergency Management Agency*, 847 F.2d 515, 519 n.4 (9th Cir. 1988) (rejecting distinction). There is no indication, however, that the Seventh Circuit, or any other court of appeals, would have considered the governmental activity at issue here—the delivery of third-class bulk rate mail—to be "proprietary" in nature. Third class mail, which may not be carried legally outside the United States mail without payment of postage (see pages 4-5, *supra*), has no direct commercial competitor or counterpart.

Both the Seventh and Ninth Circuits have adopted the same standards for determining whether a traditional estoppel is stated:

> First, the party to be estopped must know the facts. Second, this party must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel had a right to believe it is so intended. Third, the party asserting estoppel must have been ignorant of the facts. Finally, the party asserting estoppel must reasonably rely on the other's conduct to his substantial injury.

Portmann, 674 F.2d at 1167; *TRW, Inc.* v. *Federal Trade Commission,* 647 F.2d 942, 950-951 (9th Cir. 1981) (citations omitted). The elements of justifiable reliance and substantial injury are missing on the facts as alleged in this case.

First, a reasonable person would not expect to receive a guarantee that mail sent at an inexpensive third-class bulk rate would be expeditiously delivered. At the least, a reasonable person would not rely upon an oral promise of such delivery by an unnamed individual in these circumstances; he or she would surey insist on written documentation. See *Heckler* v. *Community Health Services, Inc.,* 467 U.S. at 65 (reliance on "official action that is not confirmed or evidenced by a written instrument" is inappropriate).[4]

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[4] Several factors, including the necessity of avoiding fraud and ensuring that government employees stay within the scope of their authority, "argue[] strongly for the conclusion that an estoppel cannot be erected on the basis of * * * oral advice." *Heckler* v. *Community Health Services, Inc.,* 467 U.S. at 65; see also Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government,* 53 U. Chi. L. Rev. 1026, 1030-1031 (1986) (decisions of this Court suggest that "reliance upon oral representations of government officials might be per se

Second, uncontrovered evidence submitted in an earlier proceeding in the Claims Court,[5] shows that, of the 431,967 circulars mailed by third-class, only about 1,300 were not delivered prior to election day. See *Rider* v. *United States,* 7 Cl. Ct. 770, 772 (1985). And even these mailings were delivered by 3:00 p.m. on election day. *Ibid.* Thus, it cannot be said that petitioner suffered any "substantial injury" justifying an estoppel.[6]

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unreasonable"). The oral nature of the transaction also makes it difficult to "ascertain[] what had actually been discussed and what information had been provided to the government representative during the short interview." *Morgan* v. *Heckler,* 779 F.2d 544, 546 (9th Cir. 1985) (citing *Schweiker* v. *Hansen,* 450 U.S. at 789). In *Schweiker* v. *Hansen,* this Court declined to base estoppel upon an oral interview "because of possibly erroneous replies to oral inquiries." 450 U.S. at 788. In this case, petitioner cannot even identify the Postal Service employee who allegedly made the promises he relied upon, thereby preventing the government from presenting any contravening evidence of the substance of the informal conversation. It may well be that petitioner is mistaken in his allegation or misunderstood the significance of a statement, perhaps confusing an estimate offered by the employee with a guarantee of the time of delivery.

[5] Petitioner originally filed breach of contract claims against the United States in the United States Claims Court. *Rider* v. *United States,* 7 Cl. Ct. 770 (1985). The Claims Court found that petitioner had failed to provide any documentary evidence showing that petitioner himself, as opposed to the political organization that held the third-class bulk rate permit, was a party to any contract with the Postal Service. *Id.* at 774. Moreover, the court held that it lacked jurisdiction to impose a "quasi-contractual" obligation on the Postal Service, and that the alleged contract was not cognizable under the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*). 7 Cl. Ct. at 774-775. The United States Court of Appeals for the Federal Circuit affirmed this grant of summary judgment in an unpublished decision. 790 F.2d 91 (Fed. Cir. 1986) (Table).

[6] Nor is the conclusion that estoppel is inappropriate affected in any way by the Postal Service's "sue-and-be-sued" clause. Contrary to petitioner's contention (Pet. 3), *Franchise Tax Board* v. *United States*

3. Finally, petitioner's complaint was properly dismissed for other independent reasons. To begin with, the Claims Court found on summary judgment that petitioner had failed to present any documentary evidence that he had any interest in the election circulars at issue. *Rider,* 7 Cl. Ct. at 774. The holder of the permit for third-class bulk rate mailing was not the petitioner, but an organization called "Citizens for Proposition M" (CPM). *Ibid.* Although petitioner claimed that he and CPM were "one and the same," the financial disclosures forms filed by CPM with the State of California did not mention petitioner as either an officer or a contributor to this organization. *Ibid.* Accordingly, as the Claims Court found, petitioner has not established that he was in privity of contract with the Postal Service. *Ibid.* That finding, upheld by the Federal Circuit, is entitled to collateral estoppel effect in this proceeding.

Moreover, petitioner's lawsuit, although framed as an action in contract, actually sounds in tort. As the court of appeals noted (Pet. App. A7-A8), while the "sue-and-be-sued" clause is a broad waiver of the Postal Service's sovereign immunity, Congress has specifically preserved immunity for the Postal Service from tort claims "arising out of the loss, miscarriage, or negligent transmission of letters and postal matter." 28 U.S.C. 2680(b).[7] Petitioner

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Postal Service, 467 U.S. 512 (1984), and *Loeffler* v. *Frank,* No. 86-1431 (June 13, 1988), concern only the obligations assumed by the Postal Service under its waiver of sovereign immunity; they do not concern the circumstances under which the Postal Service can be estopped from relying on its published regulations. See Pet. App. A7.

[7] See, *e.g., Anderson* v. *United States Postal Service,* 761 F.2d 527, 528 (9th Cir. 1985); *Insurance Co.* v. *United States Postal Service,* 675 F.2d 756, 758 (5th Cir. 1982); *Sportique Fashions, Inc.* v. *Sullivan,*

has attempted to plead his claim as one for breach of contract or quasi-contract, but the ultimate claim of liability remains misdelivery, which brings the case within the ambit of 28 U.S.C. 2680(b). *Allied Coin Investment, Inc.* v. *United States Postal Service,* 673 F. Supp. 982, 986-987 (D. Minn. 1987); see also *Sportique Fashions, Inc.* v. *Sullivan,* 597 F.2d 664, 667 (9th Cir. 1979). That Section is plainly designed "to bar actions for losses occasioned by the handling of goods within the postal system" (*Allied Coin,* 675 F. Supp. at 987) and thus precludes petitioner's claim, however pleaded or framed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN R. BOLTON
Assistant Attorney General

MICHAEL JAY SINGER
GREGORY C. SISK
Attorneys

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597 F.2d 664, 665 (9th Cir. 1979). "Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year." *Birnbaum* v. *United States,* 436 F. Supp. 967, 974 (E.D.N.Y. 1977), aff'd in part and rev'd in part, 588 F.2d 319 (2d Cir. 1978).

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